BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MANUEL M. MAGALLANES	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,028,047
TYSON FRESH MEATS INC.	)	& 1,028,194
Respondent	)	
Self-Insured	)	

ORDER

Respondent appeals the July 24, 2006 preliminary hearing Order For Compensation of Administrative Law Judge Brad E. Avery. Claimant was awarded temporary total disability compensation and medical treatment at respondent's expense after the Administrative Law Judge (ALJ) found that claimant had suffered personal injury by accident which arose out of and in the course of his employment with respondent. The ALJ went on to find that claimant was not a willing participant in any alleged horseplay, citing *Coleman.*[1]

ISSUES

Respondent raises the following issues in its Application filed with the Board:

1. Whether claimant met with personal injury by accident on January 17, 2006.

2. Whether claimant's alleged injuries arose out of and in the course of his employment.[2]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the ALJ should be affirmed.

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[1] *Coleman v. Armour Swift-Eckrich*, 281 Kan. 381, 130 P.3d 111 (2006).

[2] Application For Appeals Board Review And Docketing Statement at 1 (filed Aug. 2, 2006).

Claimant alleges that he suffered an accidental injury on January 17, 2006, while attending a pre-work meeting in respondent's training room. Claimant was in the meeting room with Steve Merwin, respondent's janitor, awaiting the meeting, when Ed Snovelle, another employee of respondent, came into the room. The parties agree as to what happened up to this point. However, at this point, the descriptions of the events diverge. Claimant is the only person to testify in this matter, but several affidavits were submitted for the ALJ's and the Board's consideration.

Claimant testified that as he sat in a chair awaiting the meeting, Mr. Snovelle came into the room and attempted to pass behind claimant to get to a chair at the table. Claimant testified that when Mr. Snovelle did this, he bent claimant's head down to the floor[3] or to the table.[4] Mr. Snovelle laughed when claimant fell down[5] and Mr. Snovelle then stepped on claimant's "head."[6] Claimant also alleged Mr. Snovelle stepped on his foot.

An affidavit from Mr. Snovelle gave a different description of the incident. Mr. Snovelle claimed that he never touched claimant's head or shoulders, but only pushed claimant's chair after claimant moved his chair back to block Mr. Snovelle's way. When Mr. Snovelle pushed claimant's chair, claimant pushed on the table to stop Mr. Snovelle from moving claimant's chair. This allegedly caused the table to move toward Mr. Merwin. Mr. Snovelle denied stepping on claimant's foot. Other witnesses, whose affidavits were admitted into the record at the preliminary hearing, give slightly differing versions of either claimant's story or Mr. Snovelle's story.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[7]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[8]

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[3] P.H. Trans. at 7.

[4] *Id*. at 19.

[5] *Id*. at 19-20.

[6] *Id*. at 30.

[7] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[8] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[9]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[10]

Respondent argues that claimant was an active participant in horseplay and should be denied benefits accordingly. It has long been the law in Kansas that participants in horseplay, who suffered injuries as a result, were precluded from collecting workers compensation benefits.[11] Until recently, it mattered not whether the injured party was a willing participant in the horseplay. However, the Kansas Supreme Court, in the recent case of *Coleman*,[12] changed the longstanding rule, allowing a non-participant, who is injured during horseplay, to collect workers compensation benefits.

In this matter, it is alleged that the incident leading to claimant's injuries was horseplay, with claimant claiming to be a non-participant and respondent arguing the opposite. A review of the evidence in this matter does not convince this Board Member that this incident was actually horseplay. Claimant denies pushing his chair to the wall to block Mr. Snovelle. While Mr. Snovelle tells a different story, the ALJ apparently found claimant's testimony to be more credible than Mr. Snovelle's affidavit. Rather than horseplay, this incident appears to be just an unfortunate incident at work resulting in an injury to claimant. The Board acknowledges that the record may be supplemented before the regular hearing and the introduction of additional evidence may result in a different finding. But, for preliminary hearing purposes, the Board finds the Order by the ALJ should be affirmed.

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[9] K.S.A. 2005 Supp. 44-501(a).

[10] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[11] *Neal v. Boeing Airplane Co.*, 161 Kan. 322, 167 P.2d 643 (1946).

[12] *Coleman, supra.*

As provided by the Act, these findings are not binding upon a full hearing on the claim but shall be subject to a full presentation of the facts.[13]

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order For Compensation of Administrative Law Judge Brad E. Avery dated July 24, 2006, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October, 2006.

BOARD MEMBER

c: Michael G. Patton, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge

[13] K.S.A. 44-534a(a)(2).